Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1074

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, an unincorporated association,
Petitioners,

v.

UNITED STATES OF AMERICA,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO._____

AFFILIATED UTE CITIZENS OF
THE STATE OF UTAH

Petitioners,

v.

UNITED STATES OF AMERICA

Defendant.

ERRATA SHEET

The jurisdictional statement, page 2, should read:

> "The final decision of the Court of Claims was entered on October 28, 1977. A timely application to extend the time for filing this Petition to January 31, 1978 was filed on January 26, 1978. Unless extended, the time for filing this Petition expires on January 26, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1255(1)."

The caption "Argument" on page 10 and in the Table of Contents should read:

"Reasons for Granting the Writ."

The term "mixed-blood" in the fifth line of numbered paragraph 3, page 24 should read:

"terminated Indian."

Respectfully submitted,

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Dated: Jan. 30, 1978

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IN THE

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No. .....

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, an unincorporated association,
Petitioners,

v.

UNITED STATES OF AMERICA,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Claims herein.

OPINIONS BELOW

The order of the United States Court of Claims dated October 20, 1972 dismissing certain portions of the Petition (complaint) is set forth at page A. 5 of the Appendix to this Petition and is reported at 199 Ct. of Cl. 1004. The order of the Court of Claims dated October 28, 1977 denying Petitioners' motion to vacate the earlier order, denying Petitioners' motion for summary judgment, and granting Defendant's motion for summary judgment is set forth at page A. 1 of this Petition and is unreported.

JURISDICTION

The final decision of the Court of Claims was entered on October 28, 1977. Accordingly, the time for filing this Petition expires on January 26, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Under an Indian Termination Act, declaring a phased withdrawal of Government protection and services rendered to Indians and an end to supervision of their restricted property, are the Indians deprived, by implication, of interests in intangible property rights in any species of property?

2. Whether the Court of Claims has properly implemented the prior decision of this Court holding that publication of a "termination proclamation" does not eliminate the Government's duties with respect to undivided property?

3. Whether the United States has a continuing responsibility to require that all property be distributed pursuant to the Termination Act, within the meaning of the statute of limitations definition of when claims "accrue"?

4. Whether the Court of Claims may ignore an express directive of Congress, during the course of this litigation, that certain claims be preserved?

STATUTES AND REGULATIONS INVOLVED

The Ute Termination Act, 25 U.S.C. §677aa is set out at Appendix A. 9-26. 28 U.S.C. § 2501 provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT OF THE CASE

A. *Historical Setting*

By Executive Order of October 3, 1861[1] the Uintah Valley of Utah, consisting of 2,487,787.83 acres, was set apart by President Lincoln as a reservation for the Ute Indians of the Territory of Utah.[2] The Ute's interest in the reservation was depleted when the United States opened it to Indians from other territories,[3] and further reduced by a series of Congressional Acts which are not at issue herein,[4] until, in 1954, it contained 808,000 acres of fee land plus 428,000 acres of mineral rights.

During the century, more or less, of interaction between the Ute culture and the Caucasians who settled in Utah, the policy of the United States towards Indians vacillated from confining them to reservations like Uintah Valley where they could live according to their own customs, to the "allotment" policy of the late 19th century[5] which sought to break the Indian's culture and convert them to agrarian farmers, to the New Deal policy of solidifying the Indian land base and reinforcing their culture.[6] After World War II, the adoption of House Concurrent

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[1] 1 KAPPLER 900.

[2] Act of May 5, 1864, 13 Stat. 63.

[3] Stip. 3.

[4] Prior litigation in the Indian Claims Commission and the Court of Claims has concerned the regularity of these transactions.

[5] *See* 25 U.S.C. § 331, *et. seq.*

[6] *See* the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 25 U.S.C. § 461, *et seq.*

Resolution 108 of August 1, 1953[7] and Public Law 280, of August 15, 1953[8] marked the shift in U.S. Indian policy to "termination."

"Termination" was another move against the Indian culture similar to the former allotment policy. The philosophy of termination, now generally condemned,[9] was that the character of the Indian could be changed by legislative fiat and the so-called Indian problem thereby eliminated. Under that policy all property of the tribe was divided among its members in severalty, and after a limited period of supervision — usually 2 to 10 years — the individuals' status as an Indian was declared ended in a "termination proclamation" published by the Secretary of Interior. Thereafter, laws of the states rather than the Indian laws would apply to the individual and his property.

At least eleven Indian tribes were "terminated" between 1954 and 1962.[10] The Ute Termination Act, unlike its companion acts, divided the Tribe into two groups denominated "mixed-blood" and "full-blood," and directed that only the mixed-bloods be terminated from their status as Indians and given their pro rata share of all assets. Petitioner is an unincorporated association

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[7]H.R. Conc. Res. 108, 83d Cong., 1st Sess. 67 Stat. B132.

[8]67 Stat. 588, as amended, 18 U.S.C. § 1162.

[9]*E.g., Affiliated Ute Citizens v. United States,* 406 U.S. 128, 133 n 1 (1972): The termination policy exemplified by these acts is not without its criticism. See the President's Special Message to the Congress on Indian Affairs, July 8, 1970, Public Papers of the President 1970, pp. 565-576.

[10]The Klamath Tribe, 25 U.S.C. § 564, *et seq.*, Ute Indians of Utah, 25 U.S.C. § 677, *et. seq.;* Western Oregon Indians, 25 U.S.C. § 691, *et. seq.;* Alabama and Coushatta Indians of Texas, 25 U.S.C. § 721, *et. seq.;* Paiute Indians of Utah, 25 U.S.C. § 741, *et. seq.;* Wyandotte Tribe of Oklahoma, 25 U.S.C. § 791, *et. seq.*; Peoria Tribe of Oklahoma, 25 U.S.C. § 821, *et. seq.;* Ottawa Tribe of Oklahoma, 25 U.S.C. § 841, *et. seq.;* Menominee Tribe of Wisconsin, 25 U.S.C. § 891, *et. seq.;* Catawba Tribe of South Carolina, 25 U.S.C. § 931, *et. seq.;* Ponca Tribe of Nebraska, 25 U.S.C. § 971, *et. seq.*

formed in May of 1956 pursuant to Section 6 of the Termination Act, A. 11, to represent all mixed-bloods. The individual members of Petitioner were "terminated" in their wardship relation with the United States by a proclamation published on August 27, 1961, subject to restrictions on certain property which continued until August 27, 1964.[12]

B. *The Prior Affiliated Utes Case (AUC-I) and the Instant Litigation (AUC-II)*

Two consolidated cases, initiated by the mixed-bloods in 1965 and 1968, respectively, were decided by this Court in 1972. *See, Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972) (AUC-I). The two cases arose in the United States District Court for Utah and construed the Ute Termination Act as it applied to the Ute Distribution Corporation (UDC), an entity formed in the termination process to distribute the mixed-bloods' interest in mineral royalties and proceeds of unadjudicated claims against the United States.

Between the date when AUC-I was initiated and its decision by this Court, this case (AUC-II) was initiated in the Court of Claims. AUC-I challenged the use of UDC as a means for distribution of a narrow category of rights — mineral rights — whereas AUC-II was a general claim for unconsitutional taking of assets which had *not* been distributed according to the mandate of the Termination Act.

AUC-II involved two broad categories of claims. First, claims for mismanagement of tribal funds and aboriginal claims against the United States which predated termination. Those claims were dismissed by the Court of Claims

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[11]26 Fed. Reg. 8042.

[12]Sec. 15, A. 20.

in an order dated October 20, 1972.[13] Second, AUC-II asserted that certain intangible property rights, specifically water rights, hunting and fishing rights and interests in timber resources of the reservation, had not been distributed according to the mandate of the Termination Act. The second category of claims also included a claim that certain operation and maintenance charges for irrigation projects had been wrongfully charged the mixed-bloods prior to termination and that the United States was obligated to refund them. The October 20, 1972 order reserved decision on this second category of rights.

This Court decided AUC-I in April of 1972, holding that UDC was properly formed to represent the mixed-bloods' interest in the mineral estate but awarding them damages against the custodian bank and its officers for fraud in the sale of UDC shares. On May 2, 1972 the Court of Claims ordered the parties to file memoranda discussing the impact of AUC-I on this action (AUC-II) which was then pending and then dismissed the first category of claims in its October 20, 1972 order. The parties then stipulated all material facts concerning the second category of claims and the United States moved for summary judgment on the second category of claims on the theory that all claims of Petitioners were "distributed" by August 27, 1961 and therefore barred by the statute of limitations. Petitioners filed a cross motion for summary judgment, also relying on the stipulation and AUC-I, and requested that the earlier order of dismissal be reconsidered. Petitioners' cross motion was on the theory that the stipulated facts conclusively estab-

[13]The Court, in its October 20, 1972 order, concluded that claims as to all other assets were barred by the statute of limitations because of its conclusion that such rights "were all divided and distributed by August 27, 1961, when the Secretary of the Interior issued the termination proclamation." The October 28, 1977 order determined that the remaining assets were also distributed by that date and similarly barred.

lished that the disputed property had not been distributed at all, and the claim therefore not barred and the plaintiffs entitled to judgment.

Both sides relied upon the dicta of this Court set out at the margin.[14] The United States relied upon the holding that UDC was properly formed, that its shares were distributed and free of restriction on August 27, 1961 and that therefore there was "no remaining governmental authority over those shares" and no governmental liability. Petitioners pointed to the stipulation, which established that these intangible rights were not within the stated powers of UDC and that they were not otherwise distributed,[15] and urged that the caveat of the very dicta the United States relied upon — "the undivided interests

[14]A. *The United States.* The proclamation of August 26, 1961, was contemplated by § 23 of the Act, 25 U.S.C. § 677v. To the extent the nature of the property so permitted, this marked the fulfillment of the purpose set forth in § 1 of the Act, 25 U.S.C.. § 677, namely, the termination of federal supervision over the trust and restricted property of the mixed-bloods. It stated specifically that the mixed-bloods thereupon "shall not be entitled to any of the services performed for Indians because of his status as an Indian." This broad reference obviously included the shares of UDC although the undivided interests in turn held by UDC and shared with the full-bloods remained subject to restrictions after the proclamation. Section 16(a), 25 U.S.C. § 6670(a). The UDC stock itself, however, was free of restriction; as to it, federal termination was complete. Each mixed-blood could sell his shares as he wished and to whom he pleased, subject thereafter only to the restrictions imposed by UDC's own articles. There was no remaining governmental authority over those shares. And without such authority there can be no liability on the part of the United States for failure to restrain a sale. 406 U.S. 149-150.

[15]Stip. 25 and Ex. 6, 7 and 9. The Articles of Incorporation of UDC recite that it was

> for the purpose of managing jointly with the Tribal Business Committee . . . all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practical distribution between said mixed-blood and full-blood groups and the members thereof, and for the purpose of distributing the net proceeds therefrom. . . .

and Article IV thereof recites that

> [t]he powers of this corporation shall be limited to the joint management of such claims and assets and to the receipt and distribution of the income or proceeds therefrom together with such other powers as may necessarily be incident thereto.

in turn held by UDC and shared with the full-bloods remained subject to restrictions after the proclamation," 406 U.S. 150 — required the conclusion that these admittedly undivided assets were not "distributed" on August 27, 1961 — or ever.

C. *Pertinent Stipulated Facts*

The following stipulations[16] are pertinent to the Court of Claims' conclusion that "all intangible assets [were] conveyed either in the form of shares in Ute Distribution Corporation or as appurtenant to land." A. 2.

1. The mixed-blood group was conveyed a mere 4,529.75 acres of farm lands, out of some 808,000 acres owned at termination. Stip. 19. Those conveyances, moreover, went to a small group of specific Indians and not to the mixed-blood group as a whole.

2. Two range corporations were conveyed 172,000 acres of grazing land. Stip. 12 and Ex. 13. The Court of Claims did not identify either of these corporations as being an entity to which the intangibles were "conveyed" and their corporate powers did not include the handling of water and water rights. Stip. 25 and Ex. 6 and 7. There was no evidence that water is even used on the grazing lands and hunting and fishing and timber have a doubtful relationship to them.

3. Ute Distribution Corporation, which was identified as the only entity to which the intangibles may have been "conveyed," received no lands of any description.

[16]The "Joint Statement of Issues and Facts Pertaining thereto" entered into by the parties dated October 6, 1976 is referred to as "Stip.", and the documents attached to the stipulation are referred to as "Ex." The stipulation and its exhibits are voluminus and constitute the record herein. Pursuant to Rules 23(i) and 26 of this Court these documents have not been reproduced pending action on this Petition.

4. The corporate powers of Ute Distribution Corporation did not include the intangibles, Stip. 25, and were limited to providing a medium for distribution of mineral royalties and proceeds of then unadjudicated claims against the United States.[17] Stip. 10 and Ex. 9. In that regard, see this Court's construction of those powers in AUC-I at 406 U.S. 143.

5. The delegation of powers to Ute Distribution Corporation, which this Court held in AUC-I to be the source of the Corporation's powers, was limited to "such powers and authority as may be necessary or desirable in the accomplishment of the objectives and purposes for which said corporations may be so organized." Stip. 12 and Ex. 12. No reference was made to the intangibles.

6. The UDC shares and the shares of the range corporations were not delivered to the mixed-bloods by August 27, 1961 in any event, but were held in a trust established by the United States until August 27, 1964. Stip. 14.

7. A statement was introduced into evidence in AUC-I, and made a part of the stipulation herein, in which the Government asserted that the intangibles were "lost" as an incident of termination, rather than being "conveyed" in any fashion. Stip. 24 and Ex. 24.

D. *Disposition in the Court Below*

The Court of Claims granted the Government's motion to dismiss based upon the statute of limitations, and denied Petitioner's motion for summary judgment and to reconsider the earlier order. The Court of Claims held that "all intangible assets [were] conveyed either in the form of shares in the Ute Distribution Corporation or as

[17]*See* note 16, *supra*.

appurtenant to land," A. 2. The consequence of that holding was that the Court of Claims concluded that Petitioners' claim "accrued" in 1961, for the purpose of the statute of limitations, because in the view of the lower court Petitioners' rights in these intangibles were "fixed" on that date and therefore "barred by the statute of limitations in 1967."

Though in form a mere procedural decision, the Court of Claims in fact reached the merits of this case. That is so because, to decide that Petitioners' rights were barred by August 27, 1967 it also had to decide that they were not only "distributed" on August 27, 1961, but distributed in such a way that the mixed-bloods had notice of that fact.

The case having been dismissed on the pleadings, the facts herein are all well pleaded allegations of the complaint together with the stipulated facts.

ARGUMENT

The issue that this Court considered important and certworthy in 1971 — the issue of the rights of Indians in the course of termination — remains important and certworthy today. The problem of Indian rights under termination laws has been a recurring one in the federal courts[18] and has resulted in two decisions by this Court. The inequities of the policy have led Congress to repeal at least one of these unfortunate acts,[19] but while that

[18]Most litigation has involved the Menominees, Klamaths and Utes. In addition to the Ute and Menominee cases in this Court, the federal courts have also considered related questions in Ute Indian Tribe v. Probst, 428 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 926 (1970); Kimball v. Callahan, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974); Klamath and Modoc Tribes v. United States, 436 F.2d 1008 (Ct. Cl.), *cert. denied*, 404 U.S. 950 (1971), among others.

[19]*See* Act of December 22, 1973, 87 Stat. 770, repealing the Menominee Termination Act.

may afford some relief to one band of Indians (the Menominees) termination remains a daily tragedy in the lives of the Indians of at least ten other tribes which were subjected to it.

AUC-I dealt with the use of corporations in the termination process, and held that the trust obligations of the United States vis-a-vis Indian property are satisfied when (1) property is actually "distributed" in that fashion, (2) *provided the Indians agree.* The Court of Claims has broadened the effect of this Court's decision, holding that the termination proclamation ends Governmental responsibility as to property which was not actually divided and implying a "division" from transactions the Indians never agreed to — or, indeed, had any knowledge of. That holding is a gloss on this Court's opinion in AUC-I which has the potential of unsettling Indian rights everywhere and should be indulged only after its review by this Court.

POINT I

THE COURT OF CLAIMS' TREATMENT OF THE FACTS AND LAW OF THIS CASE SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS THAT REVIEW SHOULD BE GRANTED

Because "the decisions of the Court of Claims alone would often settle the law in the absence of Supreme Court review" it has been declared that they "frequently have a unique importance that warrants review . . . inasmuch as so many of the legal responsibilities of the Government are determined solely by the Court of Claims." R. STERN AND E. GRESSMAN, SUPREME COURT PRACTICE, § 4.24 at p. 189 (4th ed. 1969). This case, involving issues of Indian rights which may be determined only by the Court of Claims, in which factual conclusions were drawn *against*

the stipulated facts, construing acts of Congress affecting the solemn trust obligations of the United States towards its Indian wards, and disposing of intangible rights of incalculable value touching the interest of millions of Native Americans, is a classic example of the need for review by this Court.

A. *The Opinion Disregards Stipulated Facts*

The Court of Claims' conclusion that "all intangible assets [were] conveyed either in the form of shares in the Ute Distribution Corporation or as appurtenant to land," A. 2, was contrary to the stipulated facts. The Court of Claims had no evidence before it save the stipulations entered into by the parties, which contained nothing from which it could be concluded that UDC had any authority with respect to these intangibles or that they were "distributed" in association with any land. In fact the Government never contended that any of the intangible assets were conveyed to Ute Distribution Corporation, and while it did contend that the intangibles were "appurtenant" to lands, the lands the Government referred to were those of two range corporations — not Ute Distribution Corporation. The range lands were transferred under circumstances in which the intangibles could not be considered "appurtenant" because (1) there was no reference to water, hunting and fishing or timber rights in these conveyances and (2) because management of such interests was beyond the corporate powers of the two corporations. Stip. 25 and Ex. 6 and 7.

Indeed, the casual way in which the Court of Claims dismissed Petitioners' claims in its October 28, 1977 order — without addressing any of the specific claims — denotes a cavalier abandon of the rights of Petitioners, on the apparent assumption that the Termination Act purports to bar any claim against the United States after

publication of the "termination proclamation" on August 27, 1961. Such a conclusion is at odds with this Court's holdings in AUC-I.

B. *The Opinion Disregards Specific Provisions of the Termination Act*

The Court of Claims cited no statutory authority for its conclusion that the intangibles were "appurtenant" to lands or to be distributed in the form of Ute Distribution Corporation stock. In fact, the following provisions of the Termination Act are irreconcilable with that conclusion.

1. Section 10, A.14, provides that the mixed-bloods' interest in the property to be divided "shall constitute an undivided interest in and to such property which may be inherited or bequeathed," but no distribution of these intangibles in a form that was inheritable or devisable was ever made.

2. Section 13(3), A. 19, contemplates that corporations will be formed for the "handling of water and water rights," but no corporation was formed for that stated purpose.

3. Section 13(3), A. 19, further stipulates that water rights may be "transferred" to a corporation when "in the opinion of said mixed-blood group, it is to the best interest of said group" to do so, and in that event "the Secretary [of Interior] is authorized to make such transfer." Neither condition was satisfied. There was no transfer by the Secretary. Neither was there a resolution by the mixed-bloods authorizing any such transfer. The stipulated facts, moreover, recite that the mixed-bloods knew of no purported disposition of the intangibles until the statement of the Government in AUC-I referred to above.

4. Section 21, A. 24, provides that "nothing [in the Act] shall abrogate any water rights of the tribe or its members." But the Court of Claims has concluded, in disregard of that provision, that the water rights were abrogated by the procedures of the Secretary under the Act.

With respect to each of these matters, we echo this Court's comment in *Arenas v. United States,* 322 U.S. 419, 427 (1944): If the Indians were not to be given their hunting and fishing, water and timber rights in severalty, why send government agents to the reservation to hold out that promise? If the water rights were not to be preserved, why include express provisions that "[n]othing [in the Act] shall abrogate any water rights" or for "[o]rganization of corporations for . . . handling of water and water rights"? If the water rights were not to be transferred and were to be "appurtenant" to lands, why the provisions in the Act requiring approval of the mixed-bloods for their transfer and declaring that in that event "the Secretary is authorized to make such transfer"?

C. *The Opinion Disregards Decisions of this Court Concerning Indian Rights*

The Court of Claims' conclusion that these intangibles could be "appurtenant" to land, or implicitly transferred to Ute Distribution Corporation, is contrary to settled authorities, including decisions in this Court construing termination laws.

1. This Court held in *Menominee Tribe v. United States,* 391 U.S. 404 (1968) that the termination acts may not be construed "as a backhanded way of abrogating the hunting and fishing rights of these Indians."

2. This Court held in *Arizona v. California,* 373 U.S. 546, 601 (1963) that reserved Indian water rights included

"future as well as present needs of the Indian Reservations," thus rejecting any notion that they are "appurtenant" to specific lands.

3. This Court held in AUC-I, in construing this very Termination Act, that "the undivided interest in turn held by UDC and shared with the full-bloods remained subject to restrictions after the proclamation [of August 27, 1961]."

Menominee and AUC-I are of particular relevance because each involved termination acts.

Menominee dealt with the claim that on publication of the termination proclamation the Indians lost their rights to hunt and fish on their former lands, which is functionally equivalent to the theories of the Court of Claims herein that such rights were "appurtenant" to lands and that publication of the termination proclamation ended any Governmental responsibility to the mixed-bloods. This Court rejected that claim and noted that (1) the Menominee Termination Act, like the Ute Termination Act, provided that all assets — even intangibles — were to be preserved to the individual Indian and (2) that the termination acts were *in pari materia* with Public Law 280 — which declares that "[n]othing in this section . . . shall deprive any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement or statute *with respect to hunting, trapping or fishing.*" (emphasis added)

The same logic applies, of course, to the other intangibles. But the Court of Claims has read the Termination Act exactly opposite to both *Menominee* and Public Law 280.

The Court of Claims in fact carried the holding of AUC-I beyond the limits of logic, effectively reading it

as overruling *Menominee* to the extent of the Court of Claims' holding that the publication of a termination proclamation was an absolute end to any governmental responsibility towards its former wards. The holding of the court below was, in fact, an echo of the holding of *State v. Sanapaw,* 21 Wis. 2d 377, 124 N.W.2d 41 (1963) which held that the termination acts abrogated Indian hunting and fishing rights and which this Court rejected in *Menominee.*

D. *The Court of Claims Ignored An Express Congressional Directive*

Petitioners asserted a separately denominated claim for their share of $1,606,100.60, plus interest, of Ute Indian funds wrongfully expended for the Uintah Irrigation Project. The claim was based on S. REP. No. 243, 77th Cong., 1st Sess., May 1, 1941 in which it was acknowledged that the United States had that liability but deferred payment until action was brought in the Court of Claims. Stip. 26.

Congress implicitly acknowledged liability on this claim when, on September 18, 1970, it enacted Public Law 91-403 authorizing the Secretary of Interior to reimburse the Utes for the claim, with 27.162 percent thereof to be paid to the mixed-bloods. But at that date Petitioners' claim had been on file with the Court of Claims for almost two years. Indeed, it may be inferred that the Congressional action on this claim, which had been dormant for almost thirty years, was a direct response to the litigation Petitioners had initiated.

Congress, recognizing the inequity — indeed, illegality — of acting to jeopardize matters then in litigation, inserted the following proviso in Public Law 91-403:

> *Reimbursement* of the . . . former members [of the Tribe], as provided in this Act shall be regarded as a gratuity, shall not be regarded as the settlement of a claim against the United States . . . and *shall not prejudice any litigation now pending.* (Emphasis supplied.)

Yet, the Court of Claims *dismissed* the claim *without so much as a word devoted to any suggestion of its reason for doing so.*

That result is a shocking disregard of the intent of Congress and normal judicial procedures which ought to be reviewed.

For each of the foregoing reasons, the conclusions of the Court of Claims, in the language of Rule 19 of this Court, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Such review has been granted in cases where the decision below is so wrong as to present substantial due process questions. *E.g. Garner v. Louisiana,* 368 U.S. 157, 163 (1961); *Thompson v. Louisville,* 362 U.S. 199 (1960); *Washington v. United States,* 357 U.S. 348 (1958). We submit that such conditions are present here.

POINT II

THE COURT OF CLAIMS' DISREGARD OF THE RIGHTS OF TERMINATED INDIANS CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The Court of Claims effected to dispose of the important issue of how — and most important, when — the property rights of the mixed-bloods were disposed of in a single paragraph at A. 2:

> The division and distribution of assets of which plaintiffs complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the *Ute Distribution Corporation* or as *appurtenant to land;* whatever claims plaintiffs may have had matured then and became barred by the statute of limitations in 1967. (emphasis added)

In so holding, the Court of Claims disregarded the rights of terminated Indians, as construed in *Menominee* and AUC-I. It further disregarded the many cases declaring that the plenary power of Congress[20] to regulate Indian affairs imposes upon the United States "the duty of exercising a fostering care and protection" over the Indian and his property. *United States v. Sandoval,* 231 U.S. 28 (1913).

A. *The Court of Claims has Ignored Time Honored Policies in Interpreting Indian Laws*

The factual errors in Court of Claims' conclusion that Petitioners' claims were barred by the statute of limitations because the intangible property rights were implicitly "distributed" by August 27, 1961 (*i.e.,* the date of the termination proclamation) have already been noted. But more importantly, by *implying* such a distribution of the intangibles the Court of Claims has ignored the entire tradition of Indian law.

An unbroken line of authorities extending over a century hold that the Indian laws and acts of Government officials implementing them are to be liberally construed *in favor of the Indian. E.g., Choate v. Trapp,* 224 U.S. 665, 675 (1912):

[20] *See* Choate v. Trapp, 224 U.S. 665, 671 (1912) for a discussion of this "plenary" power.

> The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.
>
> • • •
>
> In view of the universality of this rule, Congress is *conclusively presumed* to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor....

And with respect to the conclusion of the Court of Claims that the duty towards these Indians vis-a-vis their undivided property ended upon the publication of the termination proclamation, this Court has said:[21]

> Whenever, in pursuance of the legislation of Congress, rights [of an Indian] have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation. *Ballinger v. Frost,* 216 U.S. 240, 249 (1910)

See also, Ash Sheep Co. v. United States, 252 U.S. 159 (1920); *Kansas Indians,* 72 U.S. (5 Wall.) 737, 760 (1866); *Jones v. Meehan,* 175 U.S. 1 (1899).

Contrary to these holdings the Court of Claims held that these Indians' rights were disposed of by events

[21] The Court of Claims' restrictive view of the Termination Act conflicts with the liberal interpretation in United States v. Pierce, 235 F.2d 885, 888 (9th Cir. 1956). *See also,* Hy-Yu-Tse-Mil-Kin v. Smith, 194 U.S. 401 (1904); Halbert v. United States, 283 U.S. 753 (1930); Arenas v. United States, 322 U.S. 419 (1944).

which the court itself was unable to state with precision, and the Indians charged with notice by events which the lower court either could not or would not define.

This Court should grant certiorari to reaffirm, in relation to the recent termination laws, the time-honored concept that an administrative official cannot alter the procedures prescribed by Congress for the protection of Indians. As the Court of Appeals for the Ninth Circuit has said:

> In his dealings with the Indians, the Secretary of Interior does not have the power of an asiatic potentate or even of a benevolent despot. He, like his wards themselves, is subject to legislative restrictions. *United States v. Arenas,* 158 F.2d 730, 747-8 (9th Cir. 1947), *cert. denied,* 331 U.S. 842.

B. *The Court of Claims' Conclusion Conflicts with the Opinion of the Court of Appeals for the Ninth Circuit*

The result reached by the Court of Claims in implying a distribution of the intangibles conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Kimball v. Callahan,* 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974). In *Callahan* the Court considered a claim that under the companion Klamath Termination Act the Indians lost their rights to hunt on the former reservation lands when they were sold to satisfy termination claims. Relying on *Menominee,* the Ninth Circuit concluded "that a Klamath Indian possessing such rights on the former reservation . . . retains them even though he relinquishes his tribal membership *or the reservation shrinks pursuant to the Act.*" (emphasis added) *Id.* at 569. That conclusion is inconsistent with the conclusion herein that hunting and fishing (or any intangible rights) were "appurtenant" to lands and lost when they were disposed of. In contrast with the Klamaths, the Utes have been told that they no longer have hunting and fishing rights and the only reason that can be offered is that the reservation lands "shrunk" by reason of dispositions under the Termination Act.

POINT III

THE COURT OF CLAIMS' UNNECESSARILY HARSH READING OF THE STATUTE OF LIMITATIONS MERITS REVIEW

In the summer of 1968 the Government introduced into evidence in the trial proceedings of AUC-I a statement of Interior Department officials to the effect that the intangibles at issue herein were "lost" as an incident of termination. S. 24 and Ex. 24. The mixed-bloods claim that they had no prior notice that the Government would take that position, and this action was filed in due time in response to that statement. Yet, the Court of Claims has held — in the absence of any evidence that the mixed-bloods had any prior knowledge — that "whatever claims plaintiffs may have had . . . became barred by the statute of limitations in [August 27,] 1967." A. 2.

The Court of Claims thus held that Petitioners' rights were barred *before they had notice of their invasion.* That harsh reading of the statute of limitations, against those to whom the Government owed firm fiduciary duties of square dealing, is so shocking as to require review by this Court.

The applicable statute, 28 U.S.C. §2501, provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

The key word in the statute is "accrues." The Court of Claims held that the claim "accrued" on August 27,

1961 because the termination proclamation was published on that date and there was no "continued federal responsibility for claimed assets of the mixed-bloods beyond the time of the termination proclamation." A. 3.

A. *The Decision Below Ignores This Court's Policies on Statutes of Limitations*

The harsh holding of the Court of Claims disregards holdings of this Court in at least two respects.

First, the term "accrues" has been read to mean the time when a plaintiff has notice of the invasion of legal rights rather than the time when suit may first be instituted thereon. *Urie v. Thompson,* 337 U.S. 163, 169 (1949). The statute also does not begin to run against a trustee until the termination of the trust relationship. *Cf. Blankenship v. Boyle,* 329 F.Supp. 1089 (D.C. 1971); *Belcher v. Birmingham Trust National Bank,* 348 F. Supp. 61 (D. Ala. 1968). The Court of Claims thus gave the term the meaning that this and other Courts have rejected. *See also, Developments in the Law — Statutes of Limitations,* 63 HARV. L. REV. 1177, 1200 (1950).

Second, in other contexts this Court has said that equitable tolling applies in any situation where statutes of limitation are invoked in the federal courts. *Holmberg v. Armbrecht,* 327 U.S. 392 (1946). That doctrine has special application where, as here, the defendant is alleged to have breached firm fiduciary standards. *Bates v. Preble,* 151 U.S. 149, 160 (1893).

Certiorari should be granted to determine if either or both doctrines apply to Indian rights, for the Court of Claims has applied the statute more harshly than is the practice in other contexts involving persons better equipped to look after their own rights.

B. *The Conclusion of the Court Below Conflicts with Prior Opinions of the Federal Courts*

The Court of Claims alluded to the provisions of the Act declaring that upon publication of the termination proclamation "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable" and that "the laws of the several states shall apply to such member in the same manner as they apply to other citizens" as the predicate for its conclusion that all rights of the mixed-bloods "accrued" on August 27, 1961. In doing so it extended the words of the statute beyond their natural meaning, and ignored other provisions of the Act. It is one thing to say that in matters such as probate law, federal *statutes* dealing with Indians will no longer apply and that state statutes will be applied is their place, but quite another thing to say that the entire body of case law, based upon decisions of this Court dealing with presumption of the law concerning those whose business acumen is known to be limited, was repealed. It is one thing to say that the United States will have no further duty to supervise property distributed to the Indian, but quite another to say that the United States will have no such duty with respect to property it has *not* distributed.

In this regard the Court of Claims has construed the Act inconsistent with the construction of termination acts by at least three other federal courts.

1. The Courts of Appeals have held that the doctrine of equitable tolling, at least, is applicable to Indian rights under the very termination act in question. *See Ute Indian Tribe v. Probst,* 428 F.2d 491 (10th Cir.), *cert. denied,* 400 U.S. 926 (1970). The result reached by the Court of Claims is, therefore, in direct conflict with the result reached by the Court of Appeals for the Tenth Circuit on the effect of tolling vis-a-vis the Ute Termination Act.

2. The Court of Appeals for the Ninth Circuit in *Crain v. First National Bank,* 324 F.2d 532 (9th Cir. 1963) dealt with the closely related question of whether any vestige of the Government's supervisory control survived publication of the termination proclamation. The Klamath Indians who were the plaintiffs in *Crain* said that it did not, and that they had the right to dissolve a trust created by the Secretary. Their argument was premised on the exact assumption of the Court of Claims herein, that "once federal jurisdiction terminated on August 13, 1961, by Proclamation of the Secretary of the Interior, the guardian-ward relationship ended for all purposes and the appellants' rights to handle their property must be determined as any other persons."[22] The Court of Appeals for the Ninth Circuit categorically rejected the argument:

> Our answer is direct and simple. Federal jurisdiction did not end on August 13, 1961 and the *guardianship relation has not terminated for all purposes.*
>
> Congress has the power to determine when, how and by what steps it will emancipate the Indian and whether the emancipation shall be complete or only partial. 324 F.2d 532, 536 (emphasis added).

3. The Court of Claims reached a conclusion similar to *Crain* in *Klamath and Modoc Tribes v. United States,* 436 F.2d 1008 (Ct. Cl.), *cert. denied,* 404 U.S. 950 (1971), where the claim was that the United States had no power with respect to mixed-blood property after publication of the termination proclamation. The Court of Claims said that "[w]e would, in any event, be loath to adopt the argument that the mere passage of the Termination Act" or its implementation would "deny [the United Staes] the right to accommodate its Indian enactments within

[22]Crain v. First National Bank, 324 F.2d 532, 535-536 (9th Cir. 1963).

a short time, to changed circumstances," and further that "Courts should not look with squinty eyes at such bona fide modifications of Indian legislation to fit changed or newfound circumstances." *Id.* at 1021. The Court of Claims has nevertheless indulged in just such a narrow look at the practices under the Ute Termination Act to deny Petitioners any opportunity to test the Government's acts with respect to their property.

Thus, the square holding in *Crain* was that if the Secretary sets procedures in motion *prior* to publication of the termination proclamation, as by adopting the plans for disposition of the mixed-bloods' assets, as to that property "the guardianship relation has not terminated for all purposes." The square holding in *Klamath and Modoc* was that the United States may modify termination procedures even after the proclamation, and the square holding of *Probst* was that equitable tolling will be applied to protect the Indians. Yet, the Court of Claims refused to apply either doctrine herein.

The Act must be read in its entirety, and in light of its purpose. The language of Section 23, A. 24, prescribing the termination proclamation which the Court of Appeals relied on is plainly qualified by an exception contained in Section 16, A. 21:

> [the Secretary] shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated, *except as to his remaining interest in tribal property* in the the form of [the mineral estate] all of which shall remain subject to the terms of sections 677-677aa of this title, *notwithstanding anything contained in said sections to the contrary.* (emphasis added)

This Court's dicta in AUC-I that "the undivided interests . . . remained subject to restrictions after the proclamation"[23] was an acknowledgment of the statutory exception but was ignored by the Court of Claims.

C. *The Court of Claims Ignored Acts of the United States Subsequent to the Proclamation*

The conclusion of the Court of Claims that there was not "a continued federal responsibility for claimed assets of the mixed-bloods beyond the time [*i.e.*, August 27, 1961] of the termination proclamation" must be measured against (1) the foregoing authorities holding that the United States may change termination policies after the proclamation and (2) the stipulated facts. In that regard the Court of Claims ignored each of the following undisputed facts:

1. The act itself directed that there be limited federal supervision until August 27, 1964 — well within the statute of limitations. Sec. 15 and 16(a), A. 20 and 21. Compare Sec. 23, A. 24.

2. The Department of Interior participated in the reacquisition of mixed-blood lands until November 27, 1966. Stip. 15 and 17 and Ex. 14. At no time during the reacquisition of the lands did the United States advise the mixed-bloods that it would take the position that the intangibles were also being reacquired.

3. In the summer of 1968 the United States introduced into evidence in the proceedings leading up to AUC-I a statement dated July 18, 1966 declaring that the mixed-bloods had "lost" these intangible rights. Stip. 24 and Ex. 24. Before that time the mixed-bloods had no notice that the Government would take that position.

[23] 406 U.S. at 150.

4. Notwithstanding its statement dated July 18, 1966, the Government took the position in a litigation memorandum attached as Appendix C to Petitioners' brief filed with the Court of Claims on January 31, 1977 that "we would not consider such a termination to include the loss of entitlement to a share of the Winters Doctrine rights" (*i.e.*, reserved rights[24] under the 1861 executive order creating the reservation).

5. On September 18, 1970 Congress adopted Public Law 91-403 reimbursing the full-bloods and mixed-bloods for improper charges in connection with the Uintah Irrigation Project.

6. On June 15, 1976 UDC issued voucher checks to each mixed-blood bearing a notation that it was a "refund of money held by U.S. Treasury prior to termination." Petitioners believe that the checks represented a continued Government administration of mixed-blood funds, but the Court of Claims *refused* Petitioners' request to require the United States to file supplemental answers to interrogatories to develop the facts and then held, without an inquiry into that matter, that "plaintiffs have pointed to no evidence, and we can find none ourselves, establishing a continued federal responsibility for the claimed assets of the mixed-bloods beyond the time of the termination proclamation." (*i.e.*, August 27, 1961). A. 2-3.

7. On December 1, 1975 and December 6, 1976, respectively, the Secretary of Interior took control over the mixed-bloods' assets by changing the joint management practices as they apply to UDC. *See* 40 F.R. 5794.

The significance of these matters is that if the United States (1) took action which prevented Petitioners from

[24] *See* Winters v. United States, 207 U.S. 564 (1908).

learning of their rights[25] or (2) took any action in the continued administration of mixed-blood property[26] after March 14, 1963 (*i.e.*, six years before the action was commenced), the bar of the statute of limitations would not apply.

Again we echo this Court's holding in *Arenas v. United States*, 322 U.S. 419, 427 (1944): If the United States had no continuing authority over mixed-blood assets after August 27, 1961, why provide that the Secretary of Interior had limited supervisory control until August 27, 1964? Why mislead the mixed-bloods into believing that there was continued Governmental control?

CONCLUSION

The result reached by the Court of Claims is a harsh and unnecessary application of procedural rules to avoid accounting to Indians for their rights. Such a result is unbecoming of a nation which has made "utmost good faith" in dealing with rights of its native Americans as one of its first articles of national policy.[27] Certiorari should be granted to reaffirm that the last vestige of

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[25]*E.g.*, Castro v. United States, 500 F.2d 436 (Ct. Cl. 1974); Spevack v. United States, 390 F.2d 977, 182 Ct. Cl. 884 (1968); Steel Imp. & Forge Co. v. United States, 355 F.2d 627, 174 Ct. Cl. 24 (1966).

[26]The statute does not begin to run against a trustee until the termination of the trust relationship. Urie v. Thompson, 337 U.S. 163, 169 (1949); *Cf.* Blankenship v. Boyle, 329 F.Supp. 1089 (D.C. 1971); Belcher v. Birmingham Trust Nat. Bank, 348 F.Supp. 61 (D. Ala. 1968).

[27]*See* the Act of August 7, 1789, 1 Stat. 50, reenacting the Northwest Ordinance, Article 3 of which provided:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Indian property remaining after the mistaken policies of other eras be dealt with by the United States in accord with the true fidelity of a fiduciary.

This Court cannot, and should not, undertake to alter a policy declared by Congress, however misguided. But what it can, and we submit should do is require that the policy be discharged fairly. This Court can, and should, guarantee that these Indians are not deprived of rights arbitrarily. This Court can, and should, secure to these Indians a forum to test whether the United States has discharged its trust obligation towards them.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 156-69

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ETC.

v.

THE UNITED STATES

Parker M. Nielson for plaintiffs. *Wallace L. Duncan,* attorney of record.

Glen R. Goodsell, with whom was *Assistant Attorney General James W. Moorman,* for defendant. *James M. Mascelli,* attorney of record.

Before KUNZIG, *Judge,* Presiding, LARAMORE, *Senior Judge,* and BENNETT, *Judge.*

ORDER

This case, before the court on cross-motions for summary judgment, presents for resolution issues left undecided in our previous order of October 20, 1972, reported at 199 Ct. Cl. 1004. There we held the statute of limitations, 28 U.S.C. § 2501, barred plaintiffs' claims concerning land, cash, personal assets, oil, gas, and mineral rights, and unadjudicated and unliquidated claims against the United States. Left open for further factual development were claims concerning water, fishing, and hunting rights, and rights to future growth of timber. The court said

that the record before it did not then permit a determination as to whether that class of intangible property had been divided and distributed by the time of the termination proclamation in August 1961.

The parties have cooperated in formulating a stipulation of facts which now permits a disposition of the questions earlier left open. We find nothing in the record to shake our conviction that any acts for which the Federal Government might have been liable occurred by 1961, leaving plaintiffs' 1969 filing untimely. The purpose of the termination act was to end the tribal status of mixed-blood Utes and to convert their status to that of ordinary American citizens. The division and distribution of assets of which plaintiffs complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the Ute Distribution Corporation or as appurtenant to land, whatever claims plaintiffs may have had matured then and became barred by the statute of limitations in 1967. Plaintiffs contend that their rights matured in 1966, when the range corporations were dissolved and certain of their assets were acquired by the tribe. But, whatever rights the mixed-bloods took were fixed in 1961, after which the Federal Government took no actions affecting the parties' division of assets. The later payment of money by the Government to the Ute Distribution Corporation does not affect this conclusion, since the relative shares of that corporation were finally fixed by 1961. Neither do we find merit to plaintiffs' contention that they did not know and could not have known that all assets were being divided by the termination procedures. Defendant's numerous citations to the statute, to pre-termination correspondence, and to the plans for division and distribution, leave us no doubt that the mixed-bloods had notice of the finality of the termination procedures. In short, plaintiffs have pointed to no evidence, and we can find none ourselves, establishing a continued federal responsibility for claimed assets of the mixed-bloods beyond the time of the termination proclamation.

Although such a claim was not left open by our 1972 order, plaintiffs also seek compensation for the Government's purported liability for the alleged conflict of interest of the mixed-bloods' attorney during the termination procedures. Even if there were evidence that the attorney had a conflict of interest which injured plaintiffs and for which the Government could be held responsible, the statute of limitations bars this claim too, for the final contract between plaintiffs and the attorney ended more than 6 years before the filing of this suit.

Plaintiffs also claim entitlement to some of the tribal funds expended on the Uintah Indian Irrigation Project. Again, no federal acts after 1961 can be found which permit plaintiffs to escape the limitations bar.

Finally, plaintiffs ask that we vacate our 1972 order, claiming that federal acts since then have shown our previous ruling to have been erroneous. We disagree. The facts cited only show the weakness of the contention that federal responsibility for the division of tribal assets continued beyond the termination proclamation in 1961.

IT IS THEREFORE ORDERED, upon consideration of the motions, briefs, and oral argument, that defendant's motion for summary judgment is granted, that plaintiffs' cross-motion for summary judgment is denied, and that the petition is dismissed.

BY THE COURT

Robert L. Kunzig
Judge, Presiding

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 156-69

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ETC.

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on defendant's motion, filed February 17, 1971, for summary judgment. Upon consideration thereof, together with the opposition thereto, without oral argument, it is concluded as follows:

1. With respect to the tangible property (land, cash, and personal property), the court holds that plaintiffs' claim, first filed here on March 14, 1969, is barred by the six-year statute of limitations. The defendant's affidavits demonstrate, and plaintiffs do not deny, that these tangible assets were all divided and distributed by August 27, 1961, when the Secretary of the Interior issued the termination proclamation. Nothing further remained to be done, and under accepted principles the claim had accrued by that time.

Plaintiffs urge that, nevertheless, the claim had not accrued by that date since (1) they did not know of, and

were not chargeable as Indians with knowledge of, the claim until much later; (2) they lacked legal capacity to sue until after the close of the Secretary's ten-year period of potential supervision on August 27, 1964; and (3) in any event, until the latter date the United States had a continuing duty with respect to the tribal assets. The first point is precluded by *Capoeman v. United States,* 194 Ct. Cl. 664, 440 F.2d 1002 (1071). See, also *Mann v. United States,* 399 F.2d 671 (9th Cir., 1968). The facts were all available and an Indian group's ignorance of its legal rights does not toll the running of limitations.

The second point is likewise unacceptable. Plaintiff Affiliated Ute Citizens was organized in May 1956, and authorized "to perform all the duties and functions of the mixed-blood members" under the Partition Act. The organization acquired the right to sue (with respect to the tangible property) no later than the date of the termination proclamation in August 1961 which ended all federal supervision over those assets.

The third point is negatived by the Supreme Court's opinion and holding in *Affiliated Ute Citizens of Utah v. United States,* 460 [sic.] U.S. 128, 139, 149-50 (1972). The Court considered the tangible property, divided and distributed before the termination proclamation, as no longer in a trust status after that date and no longer a responsibility of the Federal Government. It follows that the present claim must have accrued, insofar as tangible property is concerned, no later than August 1961.

2. With respect to the class of "intangible" property consisting of oil, gas and mineral rights, and unadjudicated and unliquidated claims against the United States, the court likewise holds the claim barred by limitations. These rights were distributed, before August 1961, in the

form of shares in the Ute Development Corporation (UDC). The Supreme Court has determined that (a) UDC was lawfuly created, (b) UDC is the "authorized representative" of the mixed-bloods under the Partition Act, and (c) the termination proclamation ended all federal supervision and trust relationships with respect to the UDC shares. 406 U.S. at 136-37, 143-44, 149-150. It follows, in this court's view, that that part of plaintiffs' claims (involving "intangible" rights covered by the UDC stock) must have accrued by August 1961. Whether the claim is that the UDC shares should have been distributed differently as between various kinds of mixed-bloods, or whether it is that the form of joint management by full-bloods and mixed-bloods should have been altered so as to give greater rights to the mixed-bloods, all the facts and circumstances were known and in existence at the time of the termination proclamation. By that date, the mixed-bloods knew their relative share and, just as in the case of the tangible property, could have sued individually or through the Affiliated Ute Citizens or UDC. In this connection, it makes no difference that the underlying assets may have remained in trust status. With respect to the proportion the mixed-bloods (and the various kinds of mixed-bloods) were to get, the unrestricted UDC shares now stand in the place of the underlying assets, and the relative proportions had been finally fixed. There was no power left in the Federal Government to change those proportions, and therefore the claim as to these intangibles (which relates entirely to relative proportions) had fully ripened.

3. However, the court cannot adequately determine, on the existing record, whether or not limitations also bars the claim with respect to that class of "intangible" property consisting of water rights, fishing rights, hunting rights, and rights to future growth of timber. On the

presentation thus far made to the court, it is unclear whether or not this group of "intangibles" was divided and distributed before August 1961 — in the form of UDC shares, or as appurtenant to tangible property divided and distributed before that date, or otherwise. This aspect of the case should therefore be remanded to the trial commissioner for development of a fuller record, along with the trial and the commissioner's recommended disposition of the part of the case as to which defendant has not moved for summary judgment.

IT IS THEREFORE ORDERED that, with respect to the tangible property and the group of "intangibles" consisting of oil, gas, and mineral rights, and unadjudicated and unliquidated claims against the United States, the court grants defendant's motion on the ground that the claims are barred by limitations and to this extent the petition is dismissed.

IT IS FURTHER ORDERED that, with respect to the group of "intangibles" consisting of water rights, fishing rights, hunting rights, and rights to future growth of timber, the court denies the defendant's motion without prejudice, and remands that aspect of the case to the trial commissioner for trial (or further appropriate proceedings) along with the remainder of the case.

BY THE COURT

Chief Judge

APPENDIX OF PERTINENT STATUTES AND REGULATIONS

THE UTE TERMINATION ACT

Enacted August 27, 1954, 68 Stat. 868

Sec. 1 (25 U.S.C. § 677). *Purpose.*

The purpose of sections 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property.

Sec. 2 (25 U.S.C. § 677a). *Definitions.*

For the purposes of sections, 677-677aa of this title–

(a) "Tribe" means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

(b) "Full-blood" means a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 677c of this title.

(c) "Mixed-blood" means a member of the tribe who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice under the provisions of section 677c of this title.

(d) "Secretary" means Secretary of the Interior.

(e) "Superintendent" means the Superintendent of the Uintah and Ouray Reservation, Utah.

(f) "Asset" means any property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States.

(g) "Adult" means a member of the tribe who has attained the age of twenty-one years.

Sec. 3 (25 U.S.C. § 677b). *Method of determining Ute Indian blood.*

For the purposes of sections 677-677c of this title Ute Indian blood shall be determined in accordance with the constitution and bylaws of the tribe and all tribal ordinances in force and effect on August 27, 1954.

Sec. 4 (25 U.S.C. § 677c). *Transfer of members from full-blood roll to mixed-blood group; time; certification by Secretary.*

Any member of the tribe whose name appears on the proposed roll of full-blood members as provided in section 677g of this title and any person whose name is added to such proposed roll as the result of an appeal to the Secretary may apply to the Superintendent to become identified with and a part of the mixed-blood group; *Provided,* That such application is made within thirty days subsequent to the publication of such proposed roll or in the event of an appeal within thirty days subsequent to notification of the decision on said appeal: *And provided further,* That before such transfer is made upon the official rolls the Secretary shall first certify that, in his opinion, such change in status is not detrimental to the best interest of the person seeking such change.

Sec. 5 (25 U.S.C. § 677d). *Restriction of tribe to full-blood members after publication of final rolls; non-interest of mixed-blood members; new membership.*

Effective on the date of publication of the final rolls as provided in section 677g of this title the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in section 677-677aa of this title. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder.

Sec. 6 (25 U.S.C. § 677e). *Organization of mixed-blood members; constitution and bylaws; representatives; actions in absence of organization.*

The mixed-blood members of the tribe, including those residing on and off the reservation, shall have the right to organize for their common welfare, and may adopt an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary under such rules and regulations as he may prescribe. Such constitution may provide for the selection of authorized representatives who shall have power to take any action that is required by sections 677-677aa of this title to be taken by the mixed-blood members as a group: *Provided,* That nothing herein contained shall be construed as requiring said mixed-blood Indians to so organize if such organization is by them deemed unnecessary. In the event no such approved organization is effected, any action taken by the adult mixed-blood members, by majority vote, whether in public meeting or by referendum, but in either event, after such notice as may be prescribed by the Secretary, shall be binding upon said mixed-blood members of the tribe for the purposes of said sections.

Sec. 7 (25 U.S.C. § 677f). *Employment of legal counsel for mixed-blood members; fees.*

The mixed-blood members of the tribe as a group may employ legal counsel to accomplish the legal work required on behalf of said group under the terms of sections 677-677aa of this title, and for any other purpose by them deemed necessary or desirable; the choice of counsel and fixing of fees to be subject to the approval of the Secretary until Federal supervision over all of the members of said group and their property is terminated in the manner provided in section 677o of this title.

Sec. 8 (25 U.S.C. § 677g). *Membership rolls of full-blood and mixed-blood members; preparation and initial publication; appeal from inclusion or omission from rolls; finality of determination; final publication; inheritable interest; future membership.*

The tribe shall have a period of thirty days from August 27, 1954, in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe, living on August 27, 1954. If the tribe fails to submit such proposed rolls within the time specified in section 677-677aa of this title, the Secretary shall prepare such proposed rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in either of the papers of general circulation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such

appeals and his decision thereon shall be final and conclusive. After disposition of all such appeals to the Secretary, and after all transfers have been made pursuant to section 677c of this title the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall be published in the Federal Register, and such rolls shall be final for the purposes of sections 677-677aa of this title, but said sections shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership in the tribe, after August 27, 1954, in the manner provided in the constitution and by-laws of the tribe.

Sec. 9 (25 U.S.C. § 677h). *Sale or other disposition of certain described lands; funds; relief of United States from liability; assigned lands.*

The business committee of the tribe for and on behalf of the full-blood members of said tribe, and the duly authorized representatives for the mixed-blood members of said tribe, acting jointly, are authorized, subject to the approval of the Secretary, to sell, exchange, dispose of, and convey to any purchaser deemed satisfactory to said committee and representatives, any or all of the lands of said tribe described as follows, to wit: [Real property descriptions omitted]

All such sales, exchanges, or other dispositions shall be made upon such terms as said committee and said authorized representatives shall deem satisfactory and may be made pursuant to bids or at private sale, and all funds or other property derived from such sales, exchanges, or other dispositions shall be subject to the terms of sections 677-677aa of this title. Consent by the tribal business committee and said authorized representatives to the sale, exchange, or other disposal of the lands herein described shall relieve the United States of any liability resulting from such sale, exchange, or other disposition. The tribal business committee and said authorized representatives

are further authorized to sell or dispose of tribal assigned lands to the assignees thereof under such terms and conditions as may be agreed upon by the said tribal business committee and said authorized representatives with the assignees, subject, however, to the approval of the Secretary.

Sec. 10 (25 U.S.C. § 677i). *Division of assets; basis; prior alienation or encumbrance; partition by Secretary upon non-agreement; assistance; management of claims and rights; division of net proceeds; applicability of usual processes of the law to originally owned stock of corporate representative and to corporate distributions.*

The tribal business committee representing the full-blood group, and the authorized representatives of the mixed-blood group, within sixty days after the publication of the final membership roll, as provided in section 677g of this title, shall commence a division of the assets of the tribe that are then susceptible to equitable and practicable distribution. Such division shall be by agreement between them subject to the approval of the Secretary. Said division shall be based upon the relative number of persons comprising the final membership roll of each group. After such division the rights or beneficial interests in tribal property of each mixed-blood person whose name appears on the roll shall constitute an undivided interest in and to such property which may be inherited or bequeathed, but shall be subject to alienation or encumbrance before the transfer of title to such tribal property only as provided in sections 677-677aa of this title. Any contract made in violation of this section shall be null and void. If said groups are unable to agree upon said division within a period of twelve months from the date of such commencement, or any authorized extension of said period granted within the discretion of the Secretary, the Secretary is authorized to partition the assets of the tribe in such manner as in his opinion will be equitable

and fair to both groups. Such partition shall give rise to no cause of action against the United States and the costs of such partition shall be paid by the tribe. The Secretary is authorized to provide such reasonable assistance as may be requested by both groups, or by either group, in formulation and execution of a plan for the division of said assets, including necessary technical services of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah, and political subdivisions thereof, and members of the tribe. All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribuiton shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such management shall first be divided between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of such proceeds.

The stock of any corporation organized by the mixed-blood group for the purpose of empowering the officers of such corporation to act as the authorized representatives of said mixed-blood group in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock remains in the ownership of the original stockholder or his heirs or legatees, but the interest of stockholders in any distribuiton by such corporation shall be subject to the

usual processes of the law. [The last paragraph, dealing with stock in corporations, was not part of the law at the time of the formation of UDC, but was added by an amendment in 1962]

Sec. 11 (25 U.S.C. § 677j). *Advances or expenditures from tribal funds; restrictions on mixed-blood group until adoption of plan for terminating supervision.*

Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter deposited in the United States Treasury to the credit of the tribe or either group thereof, shall be available for advance to the tribe or the respective groups, or for expenditure, for such purposes, including per capita payments, as may be designated by the Tribal Business Committee for the full-blood members, and by the authorized agents of the mixed-blood members, and in either event subject to the approval of the Secretary: *Provided*, That the aggregate amount of the expenditures and advances authorized by this section for the mixed-blood group shall not exceed 50 per centum of the total funds of said mixed-blood group after such division, until said mixed-blood group has adopted a plan approved by the Secretary for termination of Federal supervision of said mixed-blood group, as required under section 677*l* of this title. After such termination of Federal supervision, per capita payments to the mixed-blood group shall not be subject to approval of the Secretary.

Sec. 12 (25 U.S.C. § 677k). *Adjustment of debts in making per capita payments to mixed-blood members; execution of mortgages on property.*

Fifty per centum of all per capita payments to any individual mixed-blood member made pursuant to any division or distribution under sections 677-677aa of this title shall have deducted therefrom any sum or sums of money owed by such member to the tribe, whether due or to become due, unless in

the opinion of the Secretary said debts are not adequately secured in which event the entire per capita payment shall be subject to such offset. Any other division, partition or distribution of property to any individual mixed-blood member made pursuant to sections 677-677aa of this title shall be subject to a mortgage to be made in favor of the tribe securing the payment of all sums of money owed by him to the tribe on the date of such division, partition or distribution to such individual mixed-blood member. The Secretary shall require the execution of any mortgage required under this section as a condition to any such division, partition or distribution.

Sec. 13 (25 U.S.C. § 677*l*). *Distribution to individual members of mixed-blood group; preparation and approval of plan; assistance; provisions permitted in plan.*

After the adoption of a plan for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof shall be prepared and ratiifed by a majority of said group, within the period of six months from such adoption and presented to the Secretary for approval. The Secretary is authorized to provide such reasonable assistance, including necessary technical service of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah and political subdivisions thereof, as may be required by the mixed-blood group in the preparation of such plan.

The plan for division of the assets among the members of the mixed-blood group may include:

(1) Complete disposition of all cash assets of said group, reserving, however, sufficient funds to cover—

(i) The proportionate share of said mixed-blood group in and to all expenses incurred in effecting the purposes of

sections 677-677aa of this title, including, but not limited to, the necessary expense incurred under this section and section 677m of this title;

(ii) the just and proportionate share of the mixed-bloods in the expense incurred in the prosecution of the claims of the tribe, or the bands thereof, against the United States; and

(iii) the determinable and estimated administrative costs and expenses of any mixed-blood organization authorized by sections 677-677aa of this title, including lawful and reasonable salaries and fees of authorized agents, officers and employees of said mixed-blood group.

(2) Partition of the lands of the mixed-blood group, excepting all gas, oil, and mineral rights, to corporations, partnerships, or other legal entities, and to trustees, and the individual members of said groups, quality and quantity relatively considered, according to the respective rights and interests of the parties, located so as to embrace, as far as practicable, any improvements lawfully made by the person or persons receiving such land. The value of the improvements made, under a valid lease or assignment from the tribe, shall be excluded from the valuation in making allotments to the lessee or assignee, and the land must be valued without regard to such improvements unless the lease or assignment, under which said improvements were made, provided that such improvements should become the property of the tribe. In the making of any partition due consideration shall be given to all of the rights and interests of the person or persons receiving the property, and all of the rights and interests of the other members of the tribe. Two or more of the members of said mixed-blood group may obtain their share of property as tenants in common, as joint tenants, or in any other lawful manner when such members agree among themselves as to the manner in which they desire to receive

such title. When it appears that an equitable partition cannot be made among the members of said mixed-blood group without prejudice to the rights and interests of some of them, and yet a partition is directed by the group, the members of said group may voluntarily determine compensation to be made by one party to another on account of the inequity. In all cases where equity is agreed upon by the members of said mixed-blood group, such compensatory adjustment among the parties, according to the principles of equity, must be approved by the Secretary. In the event of a failure to agree upon an equitable compensatory adjustment among the parties the Secretary shall make such adjustment and his decision shall be final.

(3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or other legal entity for any purpose, the Secretary is authorized to make such transfer.

(4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. The Secretary is authorized to make such transfer, and approve the trustees, and the terms and conditions of the trust.

(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason

it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group, after deducting reasonable cost of sale and distribution.

Sec. 14 (25 U.S.C. § 677m). *Same; procedure by Secretary if distribution not completed within seven years from August 27, 1954.*

In the event all the tribal assets, susceptible to equitable and practicable distribution, distributed to the mixed-blood group under the provisions of section 677i of this title, are not, within seven years from August 27, 1954, distributed to the individual mixed-blood members as contemplated in the plan to be adopted in accordance with the provisions of section 677l of this title, so as to effectively terminate Federal supervision over said assets, then the Secretary shall proceed to make such distribution in a manner, in his discretion, deemed fair and equitable to all members of said group, or convey such assets to a trustee for liquidation and distribution of the net proceeds, or convey such assets to the persons entitled thereto as tenants in common.

Sec. 15 (25 U.S.C. § 677n). *Disposal by mixed-blood members of their individual interests in tribal assets; requisites and conditions.*

Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of he mixed-blood group determines to dispose of his interests in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by

the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period.

Sec. 16 (25 U.S.C. § 677o). *Termination of restrictions on individually owned property of the mixed-blood group.*

(a) *Transfer of control of trust property; removal of sales restrictions.*

When any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 677i of this title, whether such distribution is made in part or in whole to a corporation, partnership, or trusteeship in which he is interested, or otherwise, the Secretary is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States, and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated, except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of sections 677-677aa of this title, notwithstanding anything contained in said sections to the contrary.

(b) *Partition or sale by Secretary prior to removal of restrictions.*

Prior to the removal of restrictions in accordance with the provisions of subsection (a) of this section on land owned by more than one person, the Secretary may—

(1) upon request of any of the owners, partition the land and issue to each owner an unrestricted patent or deed for

his individual share, unless such owner is a full-blood member of the tribe or other Indian who owns trust or restricted property, in which event a trust patent or restricted deed shall be issued and such trust may be terminated or such retrictions may be removed when the Secretary determines that the need therefor no longer exists; (2) upon request of any of the owners and a finding by the Secretary that partition of all or any part of the land is not practicable, cause all or any part of the land to be sold at not less than the appraised value thereof and distribute the proceeds of sale to the owners: *Provided*, That before a sale any one or more of the owners may elect to purchase the other interests in the land, or the tribe may elect to purchase the entire interest in the land, at not less than the appraised value thereof.

Sec. 17 (25 U.S.C. § 677p). *Tax exemption; exceptions and time limits; valuation for income tax on gains or losses.*

No distribution of the assets made under the provisions of sections 677-677aa of this title shall be subject to any Federal or State income tax: *Provided*, That so much of any cash distribution made under said sections as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of said sections be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of said sections shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance; *Provided*, That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from August 27, 1954, all property

distributed to the mixed-blood members of the tribe under the provisions of section 677-677aa of this title, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to said sections. [Provisions respecting exemption from corporate income taxes were not part of the original Act, but were added later by amendment.]

Sec. 18 (25 U.S.C. § 677q). *Applicability of decedents' estates laws to individual trust property of mixed-blood members.*

The laws of the United States with respect to probate of wills, determination of heirship, and the administration of estates shall apply to the individual trust property of mixed-blood members of the tribe until Federal supervision is terminated. Thereafter, the laws of the several States, Territories, possessions, and the District of Columbia within which such mixed-blood members reside at the time of their death shall apply.

Sec. 19 (25 U.S.C. § 677r). *Indian claims unaffected.*

Nothing in sections 677-677aa of this title shall affect any claim heretofore filed against the United States by the tribe, or the individual bands comprising the tribe.

Sec. 20 (25 U.S.C. § 677s). *Valid leases, permits, liens, etc., unaffected.*

Nothing in sections 677-677aa of this title shall abrogate any valid lease, permit, license, right-of-way, lien, or other contract heretofore approved.

Sec. 21 (25 U.S.C. § 677t). *Water rights.*

Nothing in sections 677-677aa of this title shall abrogate any water rights of the tribe or its members.

Sec. 22 (25 U.C.C. § 677u). *Protection of minors, persons non compos mentis, and other members needing assistance; guardians.*

For the purposes of sections 677-677aa of this title, the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or, in the opinion of the Secretary, in need of assistance in conducting their affairs, by such means as he may deem adequate, but appointment of guardians pursuant to State laws, in any case, shall not be required until Federal supervision has terminated.

Sec. 23 (25 U.S.C. § 677v). *Termination of Federal trust; publication; termination of Federal services; application of Federal and State laws.*

Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated. Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated,

and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

Sec. 24 (25 U.S.C. § 677w). *Presentation of development program for full-blood group to eventually terminate Federal supervision; annual progress reports.*

Within three months after August 27, 1954, the business committee of the tribe representing the full-blood group thereof shall present to the Secretary a development program calculated to assist in making the tribe and the members thereof self-supporting, without any special Government assistance, with a view of eventually terminating all Federal supervision of the tribe and its members. The tribal business committee, representing the full-blood group shall, through the Secretary of the Interior, make a full and complete annual progress report to the Congress of its activities, and of the expenditures authorized under sections 677-677aa of this title.

Sec. 25 (25 U.S.C. § 677x). *Citizenship status unaffected.*

Nothing in sections 677-677aa of this title, shall affect the status of the members of the tribe as citizens of the United Sates.

Sec. 26 (25 U.S.C. § 677y). *Execution by Secretary of patents, deeds, etc.*

The Secretary shall have authority to execute such patents, deeds, assignments, releases, certificates, contracts, and other instruments, as may be necessary or appropriate to carry out the provisions of sections 677-677aa of this title, or to establish a marketable and recordable title to any property disposed of pursuant to said sections.

Sec. 27 (25 U.S.C. § 677z). *Rules and regulations; tribal or group referenda.*

The Secretary is authorized to issue rules and regulations necessary to effectuate the purposes of sections 677-677aa of

this title, and may, in his descretion, provide for tribal or group referenda on matters pertaining to management or disposition of tribal or group assets.

Sec. 28 (25 U.S.C. § 677aa). *Procedure by Secretary upon non-agreement between mixed-blood and full-blood groups.*

Whenever any action pursuant to the provisions of sections 677-677aa of this title requires the agreement of the mixed-blood and full-blood groups and such agreement cannot be reached, the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups.

Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

No. 77-1074

In the Supreme Court of the United States

OCTOBER TERM, 1977

AFFLIATED UTE CITIZENS OF THE STATE OF UTAH, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the Court of Claims dated October 28, 1977 (Pet. App. A-1) is noted at 566 F. 2d 1191. An earlier order of the Court of Claims, dated October 20, 1972 (Pet. App. A-5), is reported at 199 Ct. Cl. 1004.

JURISDICTION

The judgment of the Court of Claims was entered on October 28, 1977. On January 30, 1978, Mr. Justice Brennan granted an extension of time in which to file a petition for a writ of certiorari to and including January 31, 1978. The petition was filed on January 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the record supports the determination of the Court of Claims that petitioners' action was barred by the statute of limitations.

STATUTES AND REGULATION INVOLVED

The Ute Termination Act of 1954, 68 Stat. 868, 25 U.S.C. 677 *et seq.* is reproduced in the appendix to the petition at pages A-9 through A-26.

28 U.S.C. 2501 provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

The Ute Termination Proclamation of 1961, 26 Fed. Reg. 8042, promulgated by the Secretary of the Interior, provides:

> Pursuant to the authority contained in section 23 of the Act of August 27, 1954 (68 Stat. 877, as amended, 25 U.S.C. 677v), it is hereby proclaimed that the Federal restrictions on the property of each individual mixed-blood member of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah having been removed, the Federal trust relationship to such individual is terminated and that effective midnight, August 27, 1961, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

STATEMENT

Petitioners, mixed-blood Ute Indians, filed this suit in the Court of Claims on March 14, 1969. The complaint set forth claims against the United States based on its management of tangible and intangible property that allegedly remained in a federal trust or restricted status after promulgation of the Ute Termination Proclamation of 1961, 26 Fed. Reg. 8042. The Proclamation was issued pursuant to the Ute Termination Act of August 27, 1954, 68 Stat. 868.

Section 1 of the Ute Termination Act stated that the purpose of the Act was, in pertinent part, "to provide for the partition and distribution of the assets of the Ute Indian Tribe * * * between the mixed-blood and full-blood members thereof; [and] for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe * * *." Section 8 of the Act called for preparation of the rolls of full-blood and mixed-blood members and provided that those rolls, after disposition of appeals, would be final. Section 5 provided that on publication of the final rolls, "the tribe shall thereafter consist exclusively of full-blood members." When the rolls were published in 1956 (21 Fed. Reg. 2208), the mixed-blood petitioners were thus removed from tribal status.

The Termination Proclamation, mandated by Section 23 of the Act, was issued in August 1961. Pursuant to the statute, it declared that federal restrictions on the property of mixed-blood Utes had been removed and that the federal trust relationship with them was terminated. The Proclamation also ended their status as Indians for the purposes of federal law and subjected them to the laws of the various states in the same manner as other citizens.

On October 20, 1972, on the government's motion for summary judgment, the Court of Claims entered an order

(Pet. App. A-5) holding that petitioners' claims regarding tangible property (land, cash, and personal property) and intangible property (oil, gas, and mineral rights, plus unadjudicated and unliquidated claims against the United States) were barred by the six-year statute of limitations. The court held that these rights had been divided and distributed, and hence the petitioners' claims had accrued, by the time of the Termination Proclamation in August 1961.

The court said it was unable to determine on the basis of the existing record whether the statute of limitations also barred petitioners' claims with respect to water rights, fishing and hunting rights, and rights to future timber growth (Pet. App. A-7). The record left it unclear whether these rights had also been divided and distributed before 1961, the court said (*id.* at A-7 to A-8). The court therefore remanded that aspect of the case to the trial commissioner for development of a fuller record. In October 1976, the parties entered into a joint stipulation of facts and placed 32 exhibits into the record (see Pet. 8-9 and n. 16). Both parties then moved for summary judgment.

On October 28, 1977, the Court of Claims granted the government's motion for summary judgment and dismissed the petition before it (Pet. App. A-1). The court said it found "nothing in the record to shake our conviction that any acts for which the Federal Government might have been liable occurred by 1961, leaving plaintiffs' 1969 filing untimely" (Pet. App. A-2). The court stated that "[t]he division and distribution of assets of which plaintiffs complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the Ute Distribution Corporation or as appurtenant to land, [and that] whatever claims plaintiffs may have had matured then and became barred by the statute of limitations in 1967" (*ibid.*). The court rejected petitioners' contention

that their claims did not mature until later, stating: "[W]hatever rights the mixed-bloods took were fixed in 1961, after which the Federal Government took no actions affecting the parties' division of assets" (*ibid.*).

The court found no support for petitioners' claim that they were unaware of the termination procedures or the consequences of those procedures. The record "leave[s] us no doubt that the mixed-bloods had notice of the finality of the termination procedures" (*ibid.*), the court said. The court concluded: "[P]laintiffs have pointed to no evidence, and we can find none ourselves, establishing a continued federal responsibility for claimed assets of the mixed-bloods beyond the time of the termination proclamation" (Pet. App. A-2 to A-3).

ARGUMENT

The decision of the Court of Claims is correct, depends largely on the particular facts of this case, and lacks general importance. It does not warrant review by this Court.

1. Petitioners' principal contention (Pet. 11-17) is that the Court of Claims, in determining that their claims were barred by the statute of limitations (28 U.S.C. 2501), misconstrued the stipulations of fact and certain provisions of the Ute Termination Act. These questions have no significance beyond the present case, but in any event there is ample support in the record for the conclusion that petitioners' claims were untimely.

The extensive stipulation of facts, as well as the accompanying exhibits, set out in detail the transactions relevant to termination of federal supervision over the mixed-blood Ute Indians. Although petitioners argued that these transactions demonstrated an enduring federal involvement with the intangible assets of the mixed-blood Utes after the 1961 proclamation, the Court of Claims

found that, by virtue of these transactions, "[t]he division and distribution of assets of which [petitioners] complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the Ute Distribution Corporation or as appurtenant to land" (Pet. App. A-2). See, *e.g.*, Stipulation, pp. 22, 24, 30. Thus, the government was able to demonstrate from the stipulated record and exhibits that if petitioners had any rights to water, fishing, and hunting, these rights were appurtenant to the lands from which federal restrictions were removed prior to the 1961 Termination Proclamation, and that any interest petitioners had in the future growth of timber was disposed of in the division of assets prior to 1961. See Stipulation, pp. 25, 32, 35. Since the rights to those assets were fixed by 1961, petitioners were not entitled to base their claims on later federal actions not affecting those rights. The court could find "no evidence establishing a continued federal responsibility for claimed assets of the mixed-bloods beyond the time of the termination proclamation" (Pet. App. A-2 to A-3).

The legislative history of the Termination Act shows that the mixed-blood Utes desired the prompt termination of federal supervision. See *Ute Indian Tribe* v. *Probst*, 428 F. 2d 491, 498 (C.A. 10), certiorari denied, 400 U.S. 926; H.R. Rep. No. 2493, 83d Cong., 2d Sess. (1954). The record in this case similarly demonstrates that petitioners decided as early as 1958 to expedite the division of assets and the termination of federal restrictions on their property. See, *e.g.*, Exhibit 11. Prior to the Termination Proclamation in 1961, petitioners participated in the division of assets with full notice and knowledge of the termination of federal trust responsibility that was involved. See, *e.g.*, Exhibits 3, 4, 5.

Nothing in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, is to the contrary. Indeed, the Court there

recognized that the 1961 Proclamation, "[t]o the extent the nature of the property so permitted, * * * marked the fulfillment of the purpose set forth in §1 of the Act, 25 U.S.C. §677, namely, the termination of federal supervision over the trust and restricted property of the mixed-bloods" (406 U.S. at 149-150).

2. Petitioners also assert (Pet. 14-15, 20-21, 23-24) that the decision below conflicts with decisions of this Court and the federal courts of appeals. The assertion is incorrect.

This Court in *Menominee Tribe* v. *United States*, 391 U.S. 404, did not hold that fishing and hunting rights are never appurtenant to land, but that the specific treaty rights of the Menominee Tribe had not been extinguished by the Menominee Indian Termination Act of 1954, 68 Stat. 250. No treaty rights are involved here. Petitioners are no longer tribal members, and their hunting and fishing rights were distributed as appurtenant to lands that were disposed of before termination. See, *e.g.*, Exhibits 26, 27 and 29. The record contains correspondence to petitioners from the Department of the Interior stating that their tribal hunting and fishing rights were to end on termination in 1961 and that any such rights would thereafter be subject to state law. See, *e.g.*, Exhibits 26, 29, 30.[1]

Nor does the decision below conflict with relevant decisions of other federal courts. In *Ute Indian Tribe* v. *Probst*, 428 F. 2d 491 (C.A. 10), certiorari denied, 400 U.S. 926, the court did not deal with the rights at issue here, but rather affirmed that the Termination Act gave the Ute Indian Tribe a right of first refusal on land sold by the mixed-bloods (428 F. 2d at 496). In *Crain* v. *First*

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[1]For the same reasons, the decision below does not conflict with *Kimball* v. *Callahan*, 493 F. 2d 564 (C.A. 9), certiorari denied, 419 U.S. 1019.

National Bank of Oregon, Portland, 324 F. 2d 532 (C.A. 9), the court concluded that the provisions of the Klamath Termination Act did not terminate all federal trust responsibility for the property of persons who (unlike petitioners here) remained tribal members (324 F. 2d at 533, 536). In *Klamath and Modoc Tribes* v. *United States*, 436 F. 2d 1008 (Ct. Cl.), certiorari denied, 404 U.S. 950, the court held that the United States could "accommodate its Indian enactments [including a termination act] within a short time, to changed circumstances" (436 F. 2d at 1021), a different matter from holding that federal supervision *must* be continued despite the provisions of a termination act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1978.

DOJ-1978-04

Supreme Court, U. S.
FILED
MAY 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1074

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, an unincorporated association,

Petitioners,

v.

UNITED STATES OF AMERICA,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

The Brief of the United States in Opposition fails to address the issues and seeks the denial of this Petition on the mere conclusion — unsupported by reasoning — that the proper construction and application of the termination laws "does not warrant review by this Court." That assertion is belied by the fact that this Court has

repeatedly declared that Indian rights under termination laws *are* of sufficient importance to merit review. *Menominee Tribe v. United States,* 391 U.S. 404 (1968, *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972). Moreover, the importance of these issues transcends the rights of the Utes, for the legislative provisions concerning the eleven tribes terminated are substantially identical. The issues, further, transcend the termination laws themselves, for they are but a revival of policies to end the Indians' status that have been recurring for more than a century. Moreover, Congress has repeatedly declared Indian rights to be — not just important — but of the highest order of importance to this nation, *e.g.,* Act of August 7, 1789, 1 Stat. 50. The President has reaffirmed this Nation's dedication to those rights subsequent to the filing of this Petition.

The effort of the Brief in Opposition to argue away the obvious conflicts between the decision of the Court of Claims and prior decisions of this Court and the Circuits is the classic "distinction without a difference." The Government does not deny the conflicts, but reasons that cases such as *Menominee* are distinguishable because "no treaty rights are involved here." Br. 7. But *Menominee* was based, in large part, upon the provisions of Public Law 280 of August 15, 1953, 67 Stat. 588, as amended, 18 U.S.C. § 1162 which — significantly — protects Indian rights under any "Federal treaty, *agreement or statute.*" (emphasis added)

The distinction offered, moreover, is no distinction at all. It is the category of "rights" which the Termination Act directed be transferred in severalty which is at issue, not whether Petitioners have any continuing Indian status. There is nothing in *Menominee* that suggests that statutory rights are less inviolate than treaty rights. The reasoning of the Government, and of the Court of Claims, is the same — precisely — as this Court rejected in *Menominee*: that because the termination proclamation ended the mixed-bloods' status as Indians it also, by implication, ended their hunting and fishing rights and interests in intangibles such as reserved water rights. This Court discussed that very reasoning in *Menominee* and then concluded:

> We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians.

Accord, Kimball v. Callahan, 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974).

At the risk of seeming facetious, we may concede that a black dog may be distinguished from a white one, but that distinction is of no consequence when the issue is the application for a dog license Neither is the distinction the Government offers of consequence to an application to this Court for enforcement of the solemn obligations to these Petitioners. That obligation applies to treaty and statutory rights alike.

By the same token, the fact that the mixed-bloods requested termination (if it were a fact) Br. 6, is no reason for the Government to disregard their rights. The Termination Act plainly directed that "*any* property of the tribe, *real, personal* or *mixed*" (emphasis added), A-10, was to be divided, A-14-15. Implementation of those provisions is all that Petitioners seek herein.

CONCLUSION

The decision of the Court of Claims is in conflict with prior decisions of this Court and the Courts of Appeals and presents issues of national importance that merit review. The Petition should be granted.

Respectfully submitted,

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